Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: April 28, 1997

CASE NO: 95-INA-517

In the Matter of:

THE WASHINGTON HOUSE,
Employer,

On Behalf of:

MARTHA YAYU LANSANA,
Alien

Appearance: P. S. Allen, Esq., Washington, D. C.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Martha Yayu Lansana (Alien), by The Washington House, (Employer) under § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.[2] Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

Statement of the case

On February 16, 1994, the Employer applied for labor certification to permit it to employ the Alien on a permanent basis as a "Food Service Supervisor" to perform the following duties:

> Assist with food preparation and compilation of trays to the Health Care Center. Check menus for accuracy and diet orders. Evaluate food intake at every meal. Prepare for special functions and deliver according to time and need. Perform Quality Assurance Check on all food.

The application (ETA 750A) noted that any U. S. applicants must have a Grade School education with two years of experience in the job Offered or two years of experience in a Related Occupation "as a Service Worker in hotel, apartment, restaurant, hospital or similar establishments." The Other Special Requirement was that the applicant be "Willing to take shifts." AF 50.[3]

On August 30, 1994, the Virginia Employment Commission (VEC) advised the Employer that it must advertise this position in a local newspaper as required by the Act and regulations, contact all applicants referred, and supply the results of such contacts with its written recruitment report to VEC. AF 35-44.

After receiving the results of the Employer's recruitment effort, the CO issued a Notice of Findings (NOF) on April 18, 1995. AF 19-36, 16-18. The CO proposed to deny certification on the grounds that the employment conditions described in the job offer would affect adversely the wages and working conditions of U. S. workers similarly employed, which was a violation of the

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The Employer is a retirement home. The Alien worked as a Dietary Aide for the Employer from August 1991 to the date of application, during which time she performed duties that are comparable to the experience requirements of the application. AF 53.

regulations governing the certification process under 20 CFR, Part 656.

The CO said that the wage offer of $6.50 per hour was below the prevailing wage of $8.95 per hour.[4] By offering a salary below the prevailing rate of pay, continued the CO, the Employer is in violation of 20 CFR §§ 656.20(c)(2), 656.20(g), and 656.21(g)(4). The CO directed Employer to rebut this finding by amending its application, and by readvertising and reposting the job offer at wages that equal or exceed the prevailing wage VEC had established.

By way of rebuttal the Employer furnished a wage survey that was prepared by an independent contractor for the purposes of this proceeding. AF 07-09. Based on this evidence, the Employer contended that its hourly rate exceeded the weighted average rate its investigator had reported, arguing that the CO should accept this as the prevailing wage for the position offered in the application. AF 06.

The CO denied certification in a Final Determination (FD), dated June 20, 1995, on the grounds that it violated 20 CFR §§ 656.20(c)(2), 656.20(g), and 656.21(g)(4)in that the wages stated in the Employer's job offer were below the applicable prevailing wage of $8.95 per hour. The CO explained that the NOF provided that in the event it elected to submit countervailing evidence that the VEC prevailing wage determination was in error, the Employer was required to include (1) its own independent wage survey of employers in the area of intended employment who employ workers in the same position and (2) a statement explaining the reasons the Employer contends that the VEC's prevailing wage determination was in error.In the NOF the CO had directed the Employer's attention to 20 CFR § 656.40, which defines prevailing rate of pay as the average rate of wages paid to workers similarly employed in the area of intended employment.

The CO observed that the NOF had directed Employer's attention to 20 CFR § 656.40[5], which defines the prevailing rate of pay as the average rate of wages paid to workers similarly employed in the area of intended employment. In stating its reasons for asserting that the VEC survey was unreliable, the Employer compared the entities surveyed and contended that its survey was superior. The CO rejected the Employer's survey as

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[4]The prevailing rate of pay was determined by VEC based on a wage survey of similarly situated employees that it conducted in the area where the job was to be performed.

[5]**20 CFR § 656.40(a)(2)(i)** provides that, "the prevailing wage for labor certification purposes shall be: (i) The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. ...;"

evidence supporting a different prevailing rate for the position, explaining that the Employer limited its survey to nursing homes, while the VEC had extended its survey for the occupation to more than a single industry. As the VEC survey contains wage data from private schools, public schools, and nursing homes/centers located in Northern Virginia, it was a cross-industry survey and for this reason met the statutory criteria, while the survey by the Employer did not. The reason the CO found that the data VEC had developed in its cross industry survey was more reliable was that cross industry data was available in Northern Virginia for the class of "similarly employed workers" cited in 20 CFR § 656.40(a)(2)(i), which consisted of employees in substantially comparable jobs in this occupational category in the area of intended employment. AF 04-05.

DISCUSSION

The CO correctly construed the provisions of 20 CFR § 656.40(a)(2)(i) on which the Final Determination based its finding as to the prevailing rate of pay. It is observed however, the Employer's survey conclusion was based on a weighed average of the wage rates reported by its survey respondents. For this reason, the Employer's argument is that the Board should broadly interpret this regulation by ignoring its plainly stated terms and including a provision for (1) a single industry survey of a job that extends across several business forms and (2) the use of "weighted" data in computing the average when the regulation makes no allowance for such an application.

The Employer's argument suggests that it is unaware that the immigration certification the Act provides a benefit by virtue of the privileged status that certification would confer on the Alien as a statutory exception to the limitations adopted by Congress on admission of foreign workers into the United States for permanent residence and employment. The object of the grant of immigration certification under the Act and regulations is to provide favored treatment to specific limited classes of foreign workers that Congress expects to bring to the U. S. labor market needed skills not otherwise available. See 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and the character of this statutory privilege is clearly indicated by the quotation in 20 CFR § 656.2(b) of a portion of the text of § 291 of the Act (8 U. S. C. 1361), which describes the burden of proof that Congress placed on the applicants in certification proceedings:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such

> document, or is not subject to exclusion under any provision of this Act ... .

Such proof of eligibility must be demonstrated by evidence of the Employer that the wage rate for the job that it offers is the same as or less than the prevailing wage in the intended area of employment. **Pesikoff v. Secretary of Labor**, 501 F2d 757, 761-762(D.C. Cir., 1974), Cert den. --- U. S. ---, 95 S.Ct 525(Nov. 25, 1974). As the Employer's rebuttal evidence did not sustain this burden of proof, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

THE WASHINGTON HOUSE, Employer,
MARTHA YAYU LANSANA, Alien

CASE NO : 95-INA-517

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: March 28, 1997